Group Health, Inc. *and* Gary Bloom

Office and Professional Employees International Union, Local 12 *and* Gary A. Bloom. Cases 18–CA–12025 and 18–CB–3144

February 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

On January 26, 1993, the National Labor Relations Board approved the stipulation of facts in this case and transferred the proceeding the Board. The General Counsel requested and received several extensions of time in which to file briefs on the merits because settlement negotiations were underway. On May 10, 1993, the General Counsel filed with the Board a motion for approval of settlement agreements, stating that the Respondent Union and the Respondent Employer had executed informal settlement agreements, but that the Charging Party had refused to become a party to those agreements. The Board granted the motion and approved the settlement agreements by Order dated September 29, 1993.[1]

On July 27, 1994, the Eighth Circuit Court of Appeals issued a decision granting the Charging Party's petition for review and remanding the case to the Board. *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994). By letter dated September 8, 1994, the Board informed the parties that it accepted the remand from the court, and that all parties could file statements of position with respect to the issues raised by the remand. Both the Union and the Employer filed position statements requesting that the Board defer the matter to allow the parties to negotiate revised settlement agreements that would comport with the Eighth Circuit's decision. The Charging Party filed a statement of position seeking a Board Order that would include broad remedial provisions as well as a provision expunging the offending language.

On June 2, 1995, the General Counsel filed a second motion for approval of settlement agreements, indicating that the Employer and the Union had executed revised informal settlement agreements. The General Counsel and the Union filed briefs in support of the motion for the approval of the revised settlement agreements, and the Charging Party filed a brief in opposition to the motion. The Charging Party refuses to be a party to these agreements, maintaining that they suffer from the same deficiencies as the original settlements.

[1] Because the Board approved the settlements, briefs on the merits have never been filed with the Board.

I. THE STIPULATION OF FACTS

The stipulation of facts indicates that the Respondent Union and the Respondent Employer were, at all relevant times, parties to a collective-bargaining agreement that contained a union-security clause requiring that employees become "members in good standing" as a condition of employment. The stipulation further indicates that the Employer withheld union dues and initiation fees from the pay of Charging Party Gary Bloom without his authorization and remitted this money to the Union. It is also stipulated that Bloom declined to become a member of the Union, and that the Union indicated to him that if he did not become a member, it would seek to terminate his employment. Finally, the stipulation states that since June 23, 1991 (the statutory limitation date), the Union has failed to inform newly hired and nonmember employees of their rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988).

II. THE ORIGINAL SETTLEMENT AGREEMENTS

The original settlement agreements provided that the Employer and the Union would post separate notices indicating that they would not bargain for, maintain, or enforce and would not give effect to, the provision in their contract requiring employees to become "members in good standing" as a condition of employment, unless that provision also provided that they need only pay the Union's periodic dues and initiation fees. The settlements also stated that the Union would provide all employees hired after June 23, 1991, all newly hired employees, and all nonmember employees notice of their *Beck* rights.

The Union further agreed under the settlements to inform employees through its notice that it would not threaten to or seek the discharge of any employee until they had been given the above notice of their *Beck* rights, and would not threaten to or seek the discharge of any employee who objected, under *Beck*, to paying full union dues and fees. The settlements additionally provided that the Union would reimburse all employees hired after June 23, 1991, all new hires, and all nonmembers who object to paying full union dues and fees the amount of dues and fees spent on the Union's nonrepresentational activities since June 23, 1991. Finally, the settlements indicated that the Charging Party had been reimbursed for the union dues and fees the Employer withheld from his pay without a valid checkoff authorization.

III. BLOOM V. NLRB

In *Bloom v. NLRB*, the Eighth Circuit denied enforcement of the Board's Order solely on the ground

that "[b]ecause the overly broad union security clause was unlawfully interpreted and applied, an adequate remedy in this case requires expunction of the offending clause." *Bloom*, 30 F.3d at 1005. The court rejected the Board's position that the original settlements adequately remedied the alleged violations, because the charged parties agreed to post notices that they would no longer give effect to the contract provision requiring that all employees become and remain members in good standing in the Union as a condition of employment, unless that provision also provided that employees need only pay the Union's periodic dues and initiation fees. *Bloom*, 30 F.3d at 1004.

The court acknowledged that employees may be able to determine the lawful extent of their union obligation during the notice-posting period, but noted that employees "cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees, as the [proposed] notice seemed to imply. Rather . . . employees need only pay that portion of union dues and fees attributable to the union's representational activities." 30 F.3d at 1004–1005 (citing *Beck*, 487 U.S. at 762–763). Further, the court noted that after the expiration of the 60-day notice-posting period, the settlement agreements did not provide for any measures to inform employees "that the lawful extent of their union obligation is actually much less than the clause states." The court expressed its concern that "[w]hile some employees may recall the notice [after the posting period], there is no guarantee that all will." Id. at 1005. The court concluded that "because a literal application of the 'member in good standing' language is unlawful, posting a temporary notice stating that the collective bargaining agreement will not be enforced as it is drafted is not sufficient to protect Group Health's employees' [S]ection 7 right to refrain from union activities." Id. Accordingly, the court reasoned that the clause must be expunged.

IV. THE REVISED SETTLEMENT AGREEMENTS

The revised settlement agreements are identical to the original settlements with the addition of certain affirmative provisions. The Union agreed to a revised settlement agreement and notice that provides that the Union "will amend our contract with the Employer to delete the provision requiring that employees become members in good standing and substitute a provision that provides that union membership is required only to the extent that employees must pay the Union's periodic dues and initiation fees." The Union's revised settlement agreement also provides that the Union "will notify each employee in the bargaining unit in writing that we have modified our contract with the Employer as described."

The Employer agreed to a revised settlement agreement and notice that provides that the Employer "will amend our contract with the Union to delete the provision requiring that employees become members in good standing and substitute a provision that provides that Union membership is required only to the extent that employees must pay the Union's periodic dues and initiation fees."

V. THE POSITIONS OF THE PARTIES

The General Counsel and the Union urge the approval of the revised settlement agreements, asserting that the sole basis of the Eighth Circuit's opinion remanding the case to the Board was that the offending union-security clause language was not expunged and that the expunction required by the revised settlement agreements fully meets the concerns raised by the Eighth Circuit. The General Counsel and the Union also maintain that the classwide reimbursement of all dues and initiation fees requested by the Charging Party is inappropriate. In its brief, the Union asserts that the classwide reimbursement of dues is impermissibly punitive both because the record lacks any evidence of employees electing to become union members as a result of the alleged coercion, and because it calls for the reimbursement of the representationally expended percentage of dues and fees to which the Union is lawfully entitled.

The Charging Party argues that the revised settlement agreements are deficient in two respects. First, the Charging Party asserts that the language that the revised settlements would substitute for the "member in good standing" requirement is unacceptable because the statement that "employees must pay the union's periodic dues and initiation fees" was also rejected by the Eighth Circuit in its decision. Second, the Charging Party maintains that the revised settlements are deficient because they do not provide appropriate monetary relief for all similarly situated employees in the unit. The Charging Party asserts that because the unlawful union membership agreement was maintained and enforced since June 23, 1991, and no information was provided to newly hired employees or nonmember unit employees of their *Beck* rights, the only appropriate remedy is for complete restitution of all dues and fees paid to the Union to be made to each employee in the unit.

VI. *California Saw* and *Weyerhaeuser Paper*

The Board has issued two lead cases addressing the ramifications of the *Beck* decision under the NLRA. In *California Saw & Knife Works*, 320 NLRB 224 (1995), the Board held that the union violated its duty of fair representation by failing to provide notice of *Beck* rights to newly hired unit employees covered by a union-security clause who were not members of the union. The Board stated that when or before the union seeks to obligate an employee to pay fees and dues

under a union-security clause, the union should inform the employee that he has the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. Further, if the employee objects, he must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures. Id. at 233.

While *California Saw* addressed the rights of nonmember employees under *Beck*, in *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1995), the Board held that *all* unit employees covered by a union-security clause, including those who are current union members, must be informed of their rights under *General Motors*[2] to refrain from becoming full union members, and their *Beck* rights to pay only that portion of union dues and fees which is germane to the union's role as the collective-bargaining representative. The Board held that current members must be told of their *General Motors* rights if they have not previously received such notice, in order to be certain that they have voluntarily chosen full membership and a concomitant relinquishment of *Beck* rights.[3] The Board explained that "[t]hese notice requirements furnish significant protection to the interests of the individual unit employee vis-a-vis *Beck* rights, without compromising the countervailing collective interests of bargaining unit employees in ensuring that every unit employee contributes to the cost of collective-bargaining activities." Id.

VII. APPROVAL OF THE REVISED SETTLEMENTS

After careful consideration, the Board has decided to approve the revised settlement agreements because we find that they are reasonable and appropriate under *Independent Stave*, 287 NLRB 740, 743 (1987), they conform to the intent of the Eighth Circuit's decision, and they comport with the Board's recent decisions in *California Saw* and *Weyerhaeuser*. In *Independent Stave* the Board set forth the factors it would examine in determining whether to approve a settlement agreement:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Applying these factors and considering all the circumstances, we have determined that the revised settlements effectuate the purposes and policies of the Act.

The Respondents have agreed to be bound by the revised settlement agreements, and the General Counsel urges their approval. Although the Charging Party opposes the revised settlements, where the other factors in *Independent Stave* are met and where the other parties in the case agree to be bound to the settlements, the Board is not precluded from approving a settlement agreement over the objections of a Charging Party. See, e.g., *Shine Building Maintenance*, 305 NLRB 478 (1991).

We find that the other factors in *Independent Stave* are met. The revised settlements are reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation. The revised settlement agreements actually provide more than what the Board would require under *California Saw* and *Weyerhaeuser Paper*. Thus, although the Charging Party argues that there are no risks of litigation because of the stipulated record in this case, there is a risk that under current Board precedent, the Board Order could require even less (that is, no expunction) than what the revised settlements provide. In addition, there is no allegation by any party that the revised settlements are a product of fraud, coercion, or duress, nor is there any evidence that the Respondents have engaged in a history of violations of the Act or have breached previous settlement agreements resolving unfair labor practice disputes.

VII. THE UNION-SECURITY CLAUSE LANGUAGE

In addition, we find that the concerns about the original settlements expressed by the Eighth Circuit in *Bloom* have been rectified. First, we note that the language objected to by the court has been deleted and different language substituted. The Charging Party argues that the substitute language, providing that "union membership is required only to the extent that employees must pay the Union's periodic dues and initiation fees," is as unacceptable under *Bloom* as the "members in good standing" language in the original settlements. The Charging Party points to language in the court's opinion stating that "employees subject to a union-security clause cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees." *Bloom*, 30 F.3d at 1004–1005 (citations omitted, emphasis in the original).

[2] 373 U.S. 734 (1963).

[3] *Weyerhaeuser*, 320 NLRB at 349.

We note, however, that the reason given by the Eighth Circuit for requiring expunction of the "members in good standing" language is that the union-security clause language was unlawfully interpreted and applied.[4] We find that the substitute language in the collective-bargaining agreement is acceptable because the statement that "Union membership is required only to the extent that employees must pay the Union's periodic dues and initiation fees" has not been unlawfully interpreted or applied. Although it is not a full recitation of an employee's rights under *Beck*, the Board does not require such notice in a collective-bargaining agreement under either *California Saw* or *Weyerhaeuser*.

Rather, under *Weyerhaeuser*, the Union now has an affirmative obligation to inform all unit employees of their rights under *General Motors* and *Beck* to refrain from full union membership as well as the right to pay only those dues and fees that are attributable to the union's representational expenses. This obligation had not been specifically set forth in a Board decision prior to *Weyerhaeuser*. With the issuance of *Weyerhaeuser*, the Board requires a union to provide this additional level of information and protection of employees' rights. In light of the fact that the court required the expunction of the union-security clause language because that language had been unlawfully interpreted and applied and in light of the affirmative obligation imposed on unions by *Weyerhaeuser* to inform all employees of the statutory limits on union-security clause obligations, we do not consider the substituted language to be an impediment to our approval of the revised settlement agreements.

Further, we note that the substitute language is taken from the Supreme Court's opinion in *NLRB v. General Motors*, 373 U.S. 734, 742 (1963), where the Court held that the "burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." This phrase also tracks the language of Section 8(a)(3) of the statute which provides "[t]hat no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of an employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." In addition, to the extent that the Eighth Circuit is concerned that "members in good standing" is misleading, the substitute language serves to alert the employees to the fact that something other than full union membership is required under the union-security provision. That alert, together with the expunction of the offending language, notice to the unit employees of the expunction, and the notice of *Beck* rights required to be given to all unit employees under our recent decisions, will ensure that the unit employees here are well informed of their statutory rights under the contractual union-security clause.[5]

Second, with respect to the posting of a temporary notice, the Eighth Circuit expressed a specific concern that because the language in the collective-bargaining agreement was unlawfully interpreted and applied, the posting of a temporary notice stating that the offending language would not be enforced would not serve to keep employees apprised of their rights after the conclusion of the 60-day posting period. As noted above, the revised settlements provide that the offending language be expunged from the parties' collective-bargaining agreement, that new language be substituted, and that the unit employees be notified in writing that this has been done. In addition, the revised settlements

[4] In *Electronic Workers IUE v. NLRB*, 41 F.3d 1532 (1994), the D.C. Circuit considered, in effect, an identical union-security clause and squarely faced the question of whether a union acted in bad faith by maintaining a union-security clause that did not include notice of *Beck* rights on its face. The court found that the union-security clause was facially valid and that the union did not violate its duty of fair representation, because there was no evidence that the union had ever attempted to enforce the clause unlawfully. Moreover, the court held that "*Beck* speaks only to the level of dues an employee may lawfully be required to pay under a union security agreement" not to the question of what language is permissible in such an agreement. Id. at 1539. Chairman Gould expresses no view on the court's holding in *Electronic Workers IUE v. NLRB*.

[5] In questioning the reason for and the extent of the Eighth Circuit's opinion in *Bloom*, the Seventh Circuit recently stated in *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1114, 1115 (7th Cir. 1996):

> The context in which the Eighth Circuit faced the facial validity issue was quite different, and thus it is not clear whether the Eighth Circuit would disagree with the D.C. Circuit [holding in *Machinists v. NLRB*, 41 F.3d 1532 (1994)] if confronted with the same fact situation that was before the latter. [See fn. 4, supra.]
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> Because the union [in *Bloom*] had apparently taken no steps to assure the rights of *Beck* objectors, the Eighth Circuit was not faced with the question whether a general union security clause, coupled with adequate notice or actual awareness of *Beck* rights, would have been sufficient to satisfy the duty of fair representation.
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> We agree with the D.C. Circuit and the NLRB that *Beck* did not, either explicitly or implicitly, call into question the facial validity of union security clauses. . . . Under *Beck*, the critical questions instead are whether the union is spending money on activities going beyond the scope of core representational matters, and if it is, how the union is assuring that the rights of potential fee objectors will be respected. Because the Eighth Circuit was not presented with an alternative mechanism for assuring those rights in the *Bloom* case, it is unclear at best whether it would find that only a modification of the union security clause itself would suffice to protect objecting employees. (In our view, therefore, the district court in Minnesota may have over-read *Bloom* in its decision in *Schreier v. Beverly California Corp.*, 892 F.Supp. 225 (D.Minn. 1995), when it concluded that the Eighth Circuit rule squarely forbids unqualified union security clauses.) .

still provide that a notice setting forth employees' *Beck* rights will be posted for 60 days, and that any employee who wishes to exercise his or her *Beck* rights will be reimbursed the amount of dues and fees spent on the Union's nonrepresentational activities since June 23, 1991.

Further, under *California Saw*, the Board now requires that newly hired employees be given notice of their *Beck* rights before or at the time the union seeks to obligate them under a union-security provision. Accordingly, as new employees enter the unit, they will introduce into the unit a continuing awareness of *Beck* rights. With the removal from the collective-bargaining agreement of the language that the court held had been unlawfully interpreted and applied and in light of the written notice sent out to each unit member that the language has been expunged and new language substituted, as well as the requirement under *Weyerhaeuser* that all unit employees be notified of their *Beck* rights, we believe that the court's concerns about the adequacy of a temporary notice posting have been met.[6]

IX. SCOPE OF THE REMEDY

The Charging Party argues that the scope of the remedy is inadequate because it does not reimburse all unit employees for all dues and initiation fees paid to the Union since June 23, 1991.[7] The General Counsel asserts there is no evidence that any employee, other than the Charging Party, suffered any economic loss because of that employee's reliance on the provisions of the union-security clause. The revised settlement agreements indicate that the Charging Party has been reimbursed all dues and fees that were unlawfully withheld from his wages. Further, the General Counsel argues, even if the Employer and the Union had maintained a union-security clause with language acceptable to the Charging Party, the Union would have been able to collect that portion of its dues related to its representational activities from objecting employees. The revised settlements do provide that all employees who became members of the Union during the statutory limitation period may register an objection to full membership in the Union and will be reimbursed for that portion of the dues and fees they have paid that are not attributable to the Union's representational activities.

In *Weyerhaeuser*, the Respondents excepted to the judge's recommended remedial requirement that it reimburse the charging party for all dues collected since his resignation from membership and filing of a *Beck* objection. The Board held that the union was required to reimburse only those dues determined to be in excess of the amount that the union could lawfully collect under *Beck*. 320 NLRB at 349 fn. 4.[8] Accordingly, in light of all these factors, we find that the scope of the remedy set forth in the revised settlements is adequate and that it will effectuate the purposes and policies of the Act to approve the revised settlement agreements.

ORDER

The Board, having duly considered the matter, orders that the General Counsel's motion is granted and the complaint is dismissed in its entirety, and the case is remanded to the Regional Director for Region 18 for further appropriate action.

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[6] Member Higgins would require that a union send out *Beck-GM* notices once a year, at least where a union requires that *Beck* objections must be renewed each year in order to remain effective. See *California Saw & Knife Works*, 320 NLRB 224, 231 fn. 41 (1995). Thus, even after the posting period is over, periodic notices would continue to issue. Although this requirement has not been adopted by his colleagues, Member Higgins agrees that the settlement is adequate under *Independent Stave*.

[7] The Eighth Circuit, in fn. 2 of its decision, indicated that "having concluded that the Board should not have approved the settlement agreements because they do not expunge the union security clause, we need not consider the other grounds upon which Bloom challenges the agreements." 30 F.3d at 1005 fn. 2.

[8] See *Gilpin v. State County Employees AFSCME*, 875 F.2d 1310, 1314–1316 (7th Cir. 1989).